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What the Marriage Equality Cases Tell Us About Voter ID

Ellen D. Katz
University of Michigan Law School, ekatz@umich.edu

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Two years ago, *United States v. Windsor*[1] tossed out the Defense of Marriage Act ("DOMA").[2] Thereafter, proponents of marriage equality secured dozens of notable victories in the lower courts, a smattering of setbacks,[3] and last June, the victory they sought in *Obergefell v. Hodges.*[4]

During this same period, opponents of electoral restrictions such as voter identification have seen far less sustained success. Decided the day before *Windsor*, *Shelby County v. Holder*[5] scrapped a key provision of the Voting Rights Act ("VRA") while making clear that plaintiffs might still challenge disputed voting regulations under Section 2 of the VRA and the Constitution itself.[6] The litigation that followed produced a select number of pro-plaintiff rulings,[7] all of which have now been stayed[8] or

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† Ralph W. Aigler Professor of Law, University of Michigan Law School. Thanks to Mary Shelly for excellent research assistance and to the University of Michigan Law School, which provided generous financial support for this project through the Cook Endowment.

[1] 133 S. Ct. 2675 (2013).

[2] *See* United States v. Windsor, 133 S. Ct. 2675 (2013).

[3] *See, e.g.,* Freedom to Marry, *Marriage Rulings in the Courts, available at* http://www.freedomtomarry.org/pages/marriage-rulings-in-the-courts, *archived at* http://perma.cc/8LCC-4GMT (updated Jan. 27, 2015), .

[4] *See* Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

[5] 133 S. Ct. 2612 (2013).

[6] *See* Shelby County v. Holder, 133 S. Ct. 2612 (2013).

[7] *See* Ohio State Conference of NAACP. v. Husted, 43 F. Supp. 3d 808 (S.D. Ohio 2014), *aff'd* Ohio State Conference of NAACP v. Husted, 768 F.3d 524 (6th Cir. 2014); Frank v. Walker, 17 F. Supp. 3d 837 (E.D. Wis. 2014); Veasey v. Perry, No. 13-CV-00193, 2014 WL 5090258 (S.D. Tex. Oct. 9, 2014); *see also* League of Women Voters of N.C. v. North Carolina, 769 F.3d 224 (4th Cir. 2014). For plaintiff successes in state law challenges to electoral restrictions, *see* Martin v. Kohls, 444 S.W.3d 844 (Ark. 2014); Applewhite v. Pennsylvania, No. 330 M.D. 2012, 2014 WL 184988, at *17 (Pa. Commw. Ct. Jan. 17, 2014).

[8] *See* North Carolina v. League of Women Voters of N.C., 135 S. Ct. 6 (2014); Veasey v. Perry, 769 F.3d 890 (5th Cir. 2014) (staying district court order); Frank v. Walker, 769 F.3d 494 (7th Cir. 2014) (staying district court order); Veasey v. Perry, 135 S. Ct. 9 (2014) (denying motion to vacate stay); Husted v. Ohio State Conference of the

overruled by higher courts.[9] The Supreme Court has yet to rule decisively,[10] but its rulings to date portend a rough road ahead for the voting plaintiffs.[11]

The voting and marriage cases since *Windsor* and *Shelby County* raise distinct questions and neither is controlling nor even applicable precedent for the other. This Article nevertheless considers the prospect that these cases have not proceeded wholly independently of one another, and, more specifically, that the marriage cases decided between *Windsor* and *Obergefell* shaped the trajectory of the voting disputes. The goal is not to prove the existence of such influence, but instead to use the prospect of it as a lens through which to examine various linkages between the two lines of cases.[12]

Like the marriage plaintiffs, the voting plaintiffs allege that the regulations they challenge significantly burden a fundamental right; that the state interests offered in defense are inadequate; and that intentional discrimination based on race and sex is present and relevant. In the marriage cases leading up to *Obergefell*, courts were inclined to deem the burden on the implicated right severe, the state interests unworthy, and the animating intent problematic. More deference, by contrast, has been given to state decision-making in the voting cases.

This greater deference stems, in part, from the familiar distinction between discriminatory intent and discriminatory effect, with the challenged voting rules often understood to fall into the latter, more deferentially reviewed category.[13] But not all of the voting rules recently challenged may be so characterized. A federal court ruling finding that intentional racial discrimination underlies the contested Texas voter ID

NAACP, 135 S. Ct. 42 (2014) (granting application to for stay); *see also* Green Party of Tenn. v. Hargett, No. 2:13-cv-224 at *3 (E.D. Tenn. Feb. 20, 2014), *available at* http://www.scribd.com/doc/208815196/TN-Opinion-on-Voter-ID, *archived at*, http://perma.cc/47CH-X6QZ (rejecting challenge to Tennessee Voter ID measure).

[9] Frank v. Walker, 135 S. Ct. 7 (2014).

[10] *See* Richard L. Hasen, *Reining in the Purcell Principle*, FLA. ST. U. L. REV. (forthcoming 2015).

[11] *See, e.g.*, Frank v. Walker, No. 14-803, 2015 WL 131119, at *1 (U.S. Mar. 23, 2015); *Veasey*, 135 S. Ct. at 9 (Ginsburg, J., dissenting); *Husted*, 135 S. Ct. at 42 (Ginsburg, Breyer, Sotomayor, & Kagan, JJ., dissenting).

[12] For a discussion of another way *Shelby County* and *Windsor* are connected, *see* Bertrall L. Ross, *The State as Witness: Windsor, Shelby County, and Judicial District of the Legislative Record*, 89 N.Y.U. L. REV. 2027 (2014).

[13] *See, e.g.*, Washington v. Davis, 426 U.S. 229, 242 (1976).

provision stands among the pro-plaintiff, post-*Shelby County* decisions that are presently inoperative.[14] As a result, the line separating intent from effect cannot alone explain the greater degree of deference accorded to state action in the voting cases.

Instead, this deference may reflect a less noticed, but deeply consequential fault line emerging within the category of conduct captured by the label of "intentional discrimination." This line separates conduct that targets members of a minority group for disfavored treatment based on animus from conduct that targets them for more particularized, instrumental reasons. The distinction, which builds on the foundation set in *Shelby County,* resurrects and recasts a line between invidious and benign intentional discrimination, isolating animus for condemnation, and functionally immunizing more instrumental conduct that imposes disfavored treatment for reasons other than the expression of bigotry.

This distinction—presently suggested by existing case law but yet to be fully operationalized—is unwarranted. State action crafted to impose significant and selective burdens on members of minority groups has long been understood as the cause of enduring injury, regardless of whether the underlying intent is grounded animus or more calculated concerns.[15] Deploying the distinction to cabin actionable discrimination caricatures is how unchecked discrimination operated prior to the civil rights movement and the shape it has taken ever since. It shields a good deal of conduct that has long fallen within the category of intentional discrimination and has long been seen as the cause of disadvantage.

The distinction also obscures a critical observation repeatedly made in the marriage cases leading to and including *Obergefell* itself that should apply in the voting disputes but has yet to find expression. Same-sex marriage bans are now understood to inflict a dignitary harm on same-sex couples by denying them the ability to participate in marriage as opposite-sex couples do as a matter of course. Many of the voting restrictions challenged post-*Shelby County* might be understood to inflict a similar dignitary harm. Onerous voter ID measures, for instance, force voters who lack conventional ID to traverse

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[14] *See* Veasey v. Perry, No. 13-CV-00193, 2014 WL 5090258 (S.D. Tex. Oct. 9, 2014); *see also infra* notes 100-04 and accompanying text.

[15] *See infra* note 110 and accompanying text.

numerous hurdles in order to cast a ballot in the same manner as voters who acquired qualifying ID for other purposes are able to do without thought or effort. Such measures make voting an ordeal for distinct groups of voters and, while they may not wholly preclude participation, deny these voters the public recognition that comes from casting a ballot "without hindrance."[16]

To date, however, the concept of dignity plays no meaningful role in the voting disputes. Courts that have found for the voting plaintiffs focus on the tangible costs challenged voting restrictions impose rather than the affront to dignitary interests they might be understood to inflict. The critical way dignity has been deployed in the marriage cases leading up to and including *Obergefell* nevertheless suggests that the concept should have traction in the voting disputes as well.

This Article proceeds as follows. Part I describes the ways in which the voting and marriage plaintiffs have pressed structurally similar claims and the greater degree of deference accorded to state action in voting cases. Part II argues that an emerging and deeply flawed distinction between animus-based and more calculated intentional discrimination may explain the different levels of deference accorded in the two lines of cases. Part III suggests that the challenged voting regulations might be seen to inflict a dignitary harm that resembles the dignitary injury same-sex marriage bans are now understood to impose. It offers some preliminary thoughts on the contours of this injury and the challenges its recognition might present.

I. LINKING THE VOTING AND MARRIAGE CLAIMS

Handed down twenty-four hours apart, *Shelby County v. Holder*[17] and *United States v. Windsor*[18] both struck down federal statutes, but emphasized plaintiffs might still pursue federal claims to challenge at least some of the state conduct regulated by the invalidated statutes. *Shelby County* stated that conduct of the sort Congress targeted in its 2006 Reauthorization of the VRA might still be actionable under

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[16] *See* City of Mobile v. Bolden, 446 U.S. 55 (1980).

[17] 133 S. Ct. 2612 (2013).

[18] 133 S. Ct. 2675 (2013).

Section 2 of the VRA and the Constitution itself.[19] *Windsor*, in turn, invalidated DOMA as an intrusion on state power while suggesting that bans on same-sex marriage might deny same-sex couples equal protection and due process of law.[20]

From the start, these claims shared broad structural similarities. This Part focuses on two: the contentions that the challenged state regulations significantly burden a fundamental right and that the state interests offered to justify the challenged regulations are (or were) either insufficiently weighty or wholly implausible. Courts evaluating these claims have, overall, accorded more deference to state action in the voting disputes than in the marriage cases leading to *Obergefell*.

A. Weighing the Burden

In the litigation that followed *Windsor*, the marriage plaintiffs have repeatedly established a significant burden on the right to marry despite the availability of civil unions or domestic partnerships that provide many, albeit hardly all, of the benefits of marriage. Meanwhile, the voting plaintiffs have been called upon to show that a challenged regulation leaves them wholly unable to vote. Alternative means of participation, including far more difficult means, must be entirely unavailable.

Since *Windsor*, the marriage plaintiffs were remarkably successful in persuading courts that bans on same-sex marriage significantly burden the right to marry.[21] Courts consistently agreed that such bans deny same-sex couples numerous tangible and intangible benefits of marriage. They observed, *inter alia*, that "[m]arriage confers respectability on a sexual relationship;" that excluding a couple from marriage "denies it a coveted status,"[22] and its children "the recognition essential to stability, predictability, and dignity"[23] and thus labels these families "as second-class."[24] Even *Deboer v. Snyder*,[25] which upheld several

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[19] *Shelby County*, 133 S. Ct. at 2630–31.

[20] *See Windsor*, 133 S. Ct.at 2693, 2707 (Scalia, J., dissenting); *see also generally* Neil S. Siegel, *Federalism as a Way Station:* Windsor *as Exemplar of Doctrine in Motion*, 6 J. OF LEGAL ANALYSIS 87 (2014).

[21] *See, e.g.*, Baskin v. Bogan, 766 F.3d 648 (7th Cir. 2014).

[22] *Id.* at 658, 670.

[23] Kitchen v. Herbert, 755 F.3d 1193, 1215 (10th Cir. 2014).

[24] Latta v. Otter, 771 F.3d 456, 472–73 (9th Cir. 2014); *see also* Bostic v. Schaefer, 760 F.3d 352, 384 (4th Cir. 2014) (Same-sex marriage ban "prohibits [same-sex couples] from participating fully in our society, which is precisely the type of segregation that the

same-sex marriage bans, refused to "deny the costs" those bans imposed on the plaintiffs, observing that they "den[y] gay couples the opportunity to publicly solemnize, to say nothing of subsidize, their relationships under state law . . . depriv[ing] them of benefits that range from the profound . . . to the mundane."[26]

Notably, these courts held that civil unions and domestic partnerships did not mitigate the burden that bans on same-sex marriage imposed. They deemed these marriage "lite" regimes inadequate substitutes for the full panoply of benefits and respectability marriage accords.[27] One district court, for instance, observed that "even if the tangible benefits of a domestic partnership are similar to marriage, creating a 'separate but equal' institution still connotes a second-class status."[28]

In the voting context, a number of lower courts have similarly found that challenged electoral regulations significantly burden voting rights.[29] For example, district courts in Wisconsin and Texas observed that voters who lacked compliant ID under state law found obtaining such ID involved

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Fourteenth Amendment cannot countenance."); Bostic v. Rainey, 970 F. Supp. 2d 456, 478 (E.D. Va. 2014) (same sex marriage ban "needlessly stigmatiz[es] and humiliate[s] children" being raised by same-sex couples and "needlessly deprive[s them] of the protection, the stability, the recognition and the legitimacy that marriage conveys").

[25] 772 F.3d 388 (6th Cir. 2014).

[26] *Id.* at 407–08. *But see* Robicheaux v. Caldwell, 2 F. Supp.3d 910, 919, 923 (E.D. La. 2014) (holding that same sex couples in Louisiana experience no significant burdens to their constitutional rights given that "Louisiana's laws apply evenhandedly to both genders—whether between two men or two women" and that "[t]here is simply no fundamental right, historically or traditionally, to same-sex marriage").

[27] *See, e.g.*, *Baskin*, 766 F.3d at 670 (noting that "the rights and obligations of domestic partners are far more limited than those of married persons"); Obergefell v. Wymyslo, 962 F. Supp. 2d 968, 975 (S.D. Ohio 2013) *rev'd sub nom.*, *DeBoer*, 772 F.3d at 388 (noting statements in legislative history acknowledging that compared to marriage, domestic partnerships would not "have all the bells and whistles," "[p]erhaps don't have all the opportunities," and do not appear "equal to everyone else's").

[28] Wolf v. Walker, 986 F. Supp. 2d 982, 1005–06 (W.D. Wis. 2014).

[29] Plaintiffs must make this claim whether they are challenging electoral restrictions as unconstitutional burdens on the right to vote or as violations of the VRA Section 2. Section 2 proscribes electoral practices that result in a denial or abridgement of the right to vote on the basis of race or membership in a protected group, and it requires plaintiffs to show that they have less ability to participate and elect representatives than do white voters, a standard that is established through the totality of circumstances. 52 U.S.C. § 10301(b); *see also* Johnson v. De Grandy, 512 U.S. 997, 1011–12 (1994). In practice, this inquiry requires plaintiffs to establish many of the same elements that they must show to establish a constitutional violation under the *Burdick-Anderson* balancing test.

numerous time-consuming and costly tasks,[30] and that the opportunities to vote without such ID were themselves onerous.[31] Similarly, both a district and appellate court held that reduced opportunities for early in-person voting ("EIP") in Ohio significantly burdened African-American and low-income voters, groups who had been more likely to use EIP voting than white, higher income voters.[32] This burden was mitigated neither by the availability to vote by mail,[33] nor by the prospect that some affected voters would still cast ballots.[34] So too, North Carolina's elimination of same-day registration and out-of-precinct voting was understood to impose a significant burden on African-American voters,[35] the appellate court found no need

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[30] *See* Frank v. Walker, 17 F. Supp. 3d 837, 854–62 (E.D. Wis. 2014) (discussing steps required to secure compliant ID); Veasey v. Perry, No. 13-CV-00193, 2014 WL 5090258, at *21 (S.D. Tex. Oct. 9, 2014); *id.* at *48 (noting fees and "the extra, often lengthy, trips" required to secure, "the absence of guidance the State provided on the requirements" and the choice it imposed between "go[ing] to work or go[ing to] get a photo ID;" *see also* Veasey v. Perry, 135 S. Ct. 9, 12 (2014) (Ginsburg, J., dissenting) (noting costs "deliberately imposed by the State," that are "at odds" with precedent, and that are "not small").

[31] *See Frank*, 17 F. Supp. at 854–62; *see also* Frank v. Walker, 773 F.3d 783, 785 (7th Cir. 2014) (Posner, J., dissenting) (noting state required photo ID for first time absentee voters, those who changed addresses or their name for marriage or other reason); *Veasey*, No. 13-CV-00193, 2014 WL 5090258, at *21, *48 (S.D. Tex. Oct. 9, 2014) (describing creation of "a second class of voters who can only vote by mail" and that obtaining "free" state ID still required costs to provide underlying documents, transportation, the prospect of being fingerprinted and overcoming widespread impression that process involved screening for outstanding warrants). *Cf.* Veasey v. Perry, 769 F.3d 890, 896 (5th Cir. 2014) (granting stay despite recognition that individual voter plaintiffs may be harmed by its decision).

[32] *See* Ohio State Conference of NAACP v. Husted, 43 F. Supp. 3d 808, 838, 841–42 (S.D. Ohio 2014) (finding the burden significant and noting absence of EIP evening hours and the reduction of Sunday voting to a single Sunday despite widespread black voter participation in Sunday "souls to polls" initiatives).

[33] *See id.* at 827–28 (noting evidence that voting by mail was complex, prone to produce disqualifying errors, and mistrusted by the voters most affected by the reduction in EIP).

[34] *See id.* at 851 (grounding Section 2 violation in fact that "reductions to EIP voting . . . result in fewer voting opportunities for African Americans than other groups of voters, as it will be more difficult for African Americans to vote during the days and hours currently scheduled than for members of other groups."); *see also* Ohio State Conference of NAACP v. Husted, 768 F.3d 524, 541–44 (6th Cir. 2014).

[35] *See* N.C. State Conference of NAACP v. McCrory, 997 F. Supp. 2d 322, 348–49 (M.D. N.C. 2014) (crediting evidence that African-American voters used SDR "at a higher rate than whites in the three federal elections during which SDR was offered"); League of Women Voters of N.C. v. North Carolina, 769 F.3d 224, 247 (4th Cir. 2014) (finding that plaintiffs were likely to succeed with claim).

for plaintiffs to demonstrate they "cannot register or vote under any circumstance."[36]

These rulings, however, have all since been stayed,[37] and one has been overruled on its merits.[38] The merits opinion, written by Judge Frank Easterbrook, stated that Wisconsin's voter ID imposed, at most, a minimal burden.[39] Judge Easterbrook posited that many Wisconsin voters lacking the requisite identification would not vote for reasons unrelated to their lack of ID, while others without ID were simply "unwilling to invest the necessary time" to obtain a qualifying ID.[40] By contrast, a legally significant burden on the right to vote arose only when voters were or would be wholly unable to accomplish what the law requires them to do.[41]

The suggestion that impermissible burdens arise only when eligible voters are categorically unable to vote stems from the Supreme Court's 2008 decision in *Crawford v. Marion County Board of Elections*.[42] That decision rejected a constitutional challenge to Indiana's voter ID law, deeming the burden the requirement imposed on most voters to be inconsequential, and the special burden it imposed on particularly disadvantaged voters indeterminate.[43] Justice Stevens's plurality opinion nevertheless left open the prospect that some plaintiffs might yet successfully challenge the law as applied to them, but did not fully explain what such plaintiffs would need to show to prevail.[44]

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[36] *League of Women Voters of N.C.*, 769 F.3d at 243 (stating that "waiving off disproportionately high African American use of certain curtailed registration and voting mechanisms as mere 'preferences' that do not absolutely preclude participation" an abuse of discretion); *N.C. State Conference*, 997 F. Supp. at 350–51 ("That voters preferred to use SDR over these methods does not mean that without SDR voters lack equal opportunity.").

[37] *See* Veasey v. Perry, 135 S. Ct. 9 (2014) (denying motion to vacate stay); Veasey v. Perry, 769 F.3d 890 (5th Cir. 2014) (staying district court order); Frank v. Walker, 769 F.3d 494 (7th Cir. 2014) (staying district court order); *see also* Frank v. Walker, 135 S. Ct. 7 (2014).

[38] *See* Frank v. Walker, 768 F.3d 744, 748 (7th Cir. 2014).

[39] *Id.*

[40] *Id.* at 749 (suggesting "that people who do not plan to vote also do not go out of their way to get a photo ID that would have no other use to them").

[41] *Id.* at 746–48, 753.

[42] Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 187, 202 (2008).

[43] *Id.* at 198–99.

[44] *Id.* at 202–03.

The opinion made clear that successful plaintiffs would need to provide more information on the burden imposed by the measure than the plaintiffs had provided in *Crawford*. Justice Stevens held, for instance, that the evidence in the case did not show that any voter "will have his or her right to vote unduly burdened" by the ID requirement, and said "virtually nothing about the difficulties faced by either indigent voters or voters with religious objections to being photographed."[45] And yet, the opinion also intimated that plaintiffs could not prevail unless they demonstrated a complete inability to vote. Justice Stevens, for example, observed that the record evidence did not document "a single, individual Indiana resident who will be unable to vote as a result of SEA 483."[46] And he made sure to point out that the "severity" of any burden imposed by the ID requirement "is, of course, mitigated" by the provisional ballot provision.[47] In short, *Crawford* can (but need not) be read to suggest that, to prevail, voters would need to show that a challenged electoral restriction left them wholly unable to vote.[48]

In *Frank v. Walker*,[49] Judge Easterbrook read *Crawford* to immunize ID measures so long as they did not render voters wholly unable to vote. He then found that the record in Wisconsin failed to show any voters for whom the ID measure proved to be an absolute bar to participation.[50] The Wisconsin law made voting more difficult for some voters, but, Judge Easterbrook emphasized, the Indiana law had facially done so as

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[45] *Id.* at 187, 201.

[46] *Crawford*, 533 U.S. at 187, 201–02 (noting testimony from some witnesses, "none of whom expressed a personal inability to vote under SEA 483," from others who were still seeking to comply, from another who suggested he was "both" unwilling and unable to comply, and an affidavit from "one homeless woman who . . . was denied a photo identification card because she did not have an address;" and observing "that single affidavit gives no indication of how common the problem is.").

[47] *Id.* at 199.

[48] *See generally* Ellen D. Katz, *Withdrawal: The Roberts Court and the Retreat from Election Law*, 93 MINN. L. REV. 1615 (2009).

[49] Frank v. Walker, 768 F.3d 744 (7th Cir. 2014).

[50] *Id.* at 746–47 (stating that trial court failed to identify "substantial numbers" of eligible voters who "tried to get a photo ID but [were] unable to do so;" that eight voters testified to various frustrating attempts, but "they did not testify that they had tried to get [birth certificates], let alone that they had tried but failed;" and that extensive findings "that the poor are less likely to have photo IDs than persons of average income" mirrored findings in Crawford that were "deemed . . . an inadequate basis for holding Indiana's law unconstitutional").

well.[51] Finding the Wisconsin and Indiana voter ID measures to be structurally similar in relevant respects, he concluded that *Crawford* "require[s] us to reject a constitutional challenge to Wisconsin's statute."[52]

Judge Posner's subsequent dissent insisted the Wisconsin record made the showing Judge Easterbrook read *Crawford* to require plaintiffs to make; namely, it identified voters wholly unable to vote due to the voter ID measure.[53] Judge Posner, however, did not think the invalidity of the Wisconsin statute hinged on such evidence. *Crawford* was distinguishable not simply because "not a single plaintiff" in that case "intend[ed] not to vote because of the new law" or "whom the law will deter from voting."[54] As important was the fact that the Indiana measure was "less restrictive"[55] in critical respects and hence less burdensome on voters. Judge Posner wrote, "*Crawford* . . . does not resolve the present case, which involves a different statute and has a different record and arises against a background of a changed political culture in the United States."[56]

All the courts that have ruled for the voting plaintiffs post-*Shelby County* have agreed. For instance, the Sixth Circuit held

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[51] *Id.* at 746.

[52] *Id.* at 751.

[53] Frank v. Walker, 773 F.3d 783, 786, 796 (7th Cir. 2014) (Posner, J., dissenting) (noting that "eight persons testified that they want to vote . . . but have been unable to obtain the required identification" and describing a voter unable to obtain a photo ID, "who voted in previous elections but will be unable to vote in the forthcoming November 4 election" and "similar" testimony from other witnesses); *see also* Frank v. Walker, 17 F. Supp. at 854, 862 (describing testimony from "eight witnesses who intend to vote in Wisconsin elections but who do not currently possess a qualifying photo ID;" and refusing to stay order because "some of the named individual plaintiffs . . . would be unable to vote during any election that occurred while the stay was in effect, as they lack a photo ID and have been unable to obtain a photo ID"); Frank v. Walker, 768 F.3d at 744, *cert. denied*, 83 U.S.L.W. 3615 (U.S. Jan. 7, 2015) (No. 14-803).

[54] Crawford v. Marion Cnty. Election Bd., 472 F.3d 949, 951–52 (7th Cir. 2007).

[55] *Frank*, 773 F.3d at 783–85 (Posner, J., dissenting) (noting that Indiana accepted more varieties of identification, allowed voters to vote absentee without submitting any identification at all, and provided a means for indigent voters to submit affidavits "confirming their identity and indigence" rather than requiring them to obtain the necessary identification documents).

[56] *Id.* at 792 (Posner, J., dissenting) (stating that obtaining photo ID may involve "significant" rather than "negligible" costs and noting "[t]o encounter 'obstacles that have prevented or deterred' persons from obtaining a photo ID means either having tried but failed to obtain a photo ID or having realized that (for these persons) the obstacles to obtaining it were insurmountable, so there would be no point in trying to overcome them").

that plaintiffs did not need to present "proof that there was no possibility [they] would find a way to adjust and vote through the remaining options."[57] Similarly, the district court in *Veasey v. Perry*[58] observed that "Plaintiffs have not demonstrated that any particular voter absolutely cannot get the necessary ID or vote by absentee ballot under SB 14," but made clear that "such an extreme burden is not necessary."[59]

Whether the Supreme Court agrees is uncertain, as it declined review in *Frank v. Walker*.[60] What is clear is that Judge Easterbrook's approach rests on a distinction—between regulations that burden a right and those that completely deny it—that finds no parallel in the marriage cases leading to *Obergefell*. Some courts characterized same-sex marriage bans as barring entirely the right to marry,[61] but the success of the marriage plaintiffs after *Windsor* never hinged on whether bans on same-sex marriage were better understood to deny the right completely or instead to burden it significantly.[62] Indeed, bans on same-sex marriage did not deny same-sex couples all the benefits of marriage, at least in jurisdictions that authorize civil unions or domestic partnerships.[63] These arrangements were

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[57] *See* Ohio State Conference of NAACP v. Husted, 768 F.3d 524, 543–44 (6th Cir. 2014); *see also* Ohio State Conference of NAACP v. Husted, 434 F.Supp.3d 808, 840–41 (S.D. Ohio 2014) (holding inability to predict whether reduction in EIP voting period "will actually reduce voter turnout . . . is not determinative of the Equal Protection analysis. Rather, the question is whether a burden has been imposed on the fundamental right to vote").

[58] Veasey v. Perry, No. 13-CV-00193, 2014 WL 5090258, at *3 (S.D. Tex. Oct. 9, 2014).

[59] *See id.* at *43.

[60] Frank v. Walker, No. 14-803, 2015 WL 131119, at *1 (U.S. Mar. 23, 2015).

[61] *See, e.g.*, Bishop v. Smith, 760 F.3d 1070, 1081 (10th Cir. 2014) ("Oklahoma has barred all same-sex couples . . . from the benefits of marriage"); Bostic v. Schaefer, 760 F.3d 352, 384 (4th Cir. 2014) (Virginia's marriage laws "prevent same-sex couples from marrying" and "exclude[e] same-sex couples from marriage"); Latta v. Otter, 771 F.3d 456, 478 (9th Cir. 2014) ("Idaho and Nevada's marriage laws . . . prevent[] same-sex couples from marrying"); Bostic v. Rainey, 970 F. Supp. 2d 456, 472 (E.D. Va. 2014) ("[U]nder Virginia's Marriage Laws, Plaintiffs and Virginia citizens similar to Plaintiffs are deprived of that right to marry.").

[62] *See, e.g.*, *Bishop*, 760 F.3d at 1080 ("State bans on the licensing of same-sex marriage significantly burden the fundamental right to marry."); *Schaefer*, 760 F.3d at 377, 384 (alternatively describing same-sex marriage ban to "prevent same sex couples from marriage, to "'significantly interfere' with a fundamental right" and to "impede the right to marry").

[63] *See, e.g.*, *Latta*, 771 F.3d at 467 (Domestic partners are "like married couples for purposes of rights and responsibilities, including with respect to children, under state law"). *Compare* Sevcik v. Sandoval, 911 F. Supp. 2d 996, 1001 (D. Nev. 2012), *rev'd and remanded sub nom*, *with* Latta v. Otter, 771 F.3d 456 (9th Cir. 2014) ("Except as

nevertheless held insufficient to alleviate the burden same-sex marriage bans impose.

B. Supporting State Interests and the Relevance of Evidence

Like the marriage plaintiffs, the voting plaintiffs have argued that the interests that States offer to justify the challenged regulations are insufficiently weighty and poorly advanced by the regulations at issue. They have secured a number of favorable rulings on point, but all have been stayed or reversed, and, here too, the merits' reversal deemed the state interests at issue adequate.[64] The voting plaintiffs have run into resistance when presenting evidence that undermines the state interests offered to justify challenged electoral restrictions. The marriage plaintiffs, by contrast, successfully undercut state justifications by either presenting evidence running counter to them or emphasizing the absence of evidence that supports them.[65] This absence of supporting evidence not only diminished the asserted state interests but also contributed to more rigorous review of the burden same-sex marriage bans imposed and the motivation behind their enactment.

After *Windsor*, courts were notably unimpressed with the interests states claim same-sex marriage bans advanced. They rejected the idea that same-sex marriage bans protect procreative marriage as "grossly over- and under-inclusive;"[66] they dismissed as "wholly illogical" the idea that permitting same-sex marriage destabilizes or otherwise damages

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otherwise provided in the statutes, domestic partners in Nevada have the same rights and responsibilities as spouses have."); Baskin v. Bogan, 766 F.3d 648, 658 (7th Cir. 2014) (domestic partnerships provide "some spousal benefits" but not "the right to adopt children jointly; spousal-support obligations, the presumption that all property of married couples is marital property; and state-mandated access to enrollment in a spouse's health insurance plan").

[64] *See infra* notes 84 & 89-90 and accompanying text.

[65] *See infra* notes 66-70 and accompanying text.

[66] *Baskin*, 766 F.3d at 661, 672 (discussing why reliance on traditional marriage to "channel[ ] procreative sex" is both over and under inclusive); *Bishop*, 760 F.3d at 1080 (rejecting "arguments based on the procreative capacity of some opposite-sex couples" on narrow tailoring grounds); *Schaefer*, 760 F.3d at 383, 384 ("[E]xclud[ing] same-sex couples from marriage due to their inability to have unintended children makes little sense."); Kitchen v. Herbert, 755 F.3d 1193, 1221 (10th Cir. 2014) ("[A]ppellants cannot assert procreative potential as a basis to deny marriage rights to same-sex couples."); *Latta*, 771 F.3d at 472 ("[S]tates give marriage licenses to many opposite-sex couples who cannot or will not reproduce . . . but not to same-sex couples who already have children or are in the process of having or adopting them.").

"traditional" marriage;[67] and they discarded as flatly impermissible the preference that children grow up in families headed by a female parent and a male parent.[68] They turned back state pleas for more time to assess whether same-sex marriage might yield negative effects, finding an absence of such effects in states that have legalized the practice as sufficient grounds to reject a wait-and-see approach.[69] And they denied the State's interest in regulating marriage pursuant to popular or majority-held values, when they have understood that interest as failing to protect minority rights.[70]

In the voting cases, States have argued primarily that challenged electoral restrictions are needed to prevent voter fraud and to foster voter confidence in the electoral system. In *Crawford*, the Supreme Court held these interests to be sufficient to support the imposition of voter ID, despite the absence of evidence that either in-person voter fraud had occurred in the jurisdiction or that the measure actually fostered confidence or participation.[71]

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[67] *See Kitchen*, 755 F.3d at 1223 ("[I]t is wholly illogical to believe that state recognition of the love and commitment between same-sex couples will alter the most intimate and personal decisions of opposite-sex couples"); *Latta*, 771 F.3d at 476 (noting that "[w]hen same-sex couples are married, just as when opposite-sex couples are married, they serve as models of loving commitment to all"); *see also* DeBoer v. Snyder, 973 F. Supp. 2d 757, 773 (E.D. Mich. 2014) ("[T]radition and morality are not rational bases for the [Michigan Marriage Act].").

[68] *Schaefer*, 760 F.3d at 384 (rejecting "optimal childrearing argument" as overbroad, and lacking "congruity"); *Latta*, 771 F.3d at 471 (calling this rationale "a categorically inadequate justification for discrimination"); De Leon v. Perry, 975 F. Supp. 2d 632, 653–54 (W.D. Tex. 2014) (rationale "presumes that same-sex couples cannot be good parents—this is the same type of unconstitutional and unfounded presumption that the Supreme Court has held 'cannot stand'"); *see also* DeBoer v. Snyder, 772 F.3d 388, 404–05 (6th Cir. 2014) (observing that "gay couples, no less than straight couples, are capable of raising children and providing stable families for them").

[69] *Baskin*, 766 F.3d at 668 (finding no basis to think that "heterosexual" marriage" has been "transformed" in Massachusetts where same-sex marriage had long been legal).

[70] *Latta*, 771 F.3d at 474 (noting need to "protect minorities from oppression by majorities"); *Baskin*, 766 F.3d at 671 (stating that "[m]inorities trampled on by the democratic process have recourse to the courts; the recourse is called constitutional law"); Campaign for S. Equal. v. Bryant, No. 3:14-CV-818-CWR-LRA, 2014 WL 6680570, at *32 (S.D. Miss. Nov. 25, 2014) ("Edith Windsor was not told to send a strongly worded letter to her Congressman."). *But see DeBoer*, 772 F.3d at 406 (holding that the issue should be resolved by the political process).

[71] Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 196–97 (2008) ("The record contains no evidence of any such fraud actually occurring in Indiana at any time in its history."); *see also* Purcell v. Gonzalez, 549 U.S. 1, 4 (2006) (observing that "[v]oters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised").

Several lower courts have nevertheless demanded supporting evidence for both claims. For instance, the district court in *Frank v. Walker* gave the State's interest in preventing voter fraud "very little weight," because "voter-impersonation fraud does not occur in Wisconsin," was only "theoretically imaginable," and, thus, was "unlikely . . . [to] become a problem in Wisconsin in the foreseeable future." [72] Similarly, in *Veasey v. Perry*, the district court found that instances of in-person voting fraud were rare in Texas and that the State's ID measure was so ill-suited to preventing such fraud that the court disputed the State's claim that concerns about fraud actually motivated the measure.[73]

Likewise, in *Ohio State Conference of NAACP. v. Husted*,[74] the district court doubted Ohio's claim that reduced opportunities for early in person (EIP) voting and the elimination of "golden week" advanced the State's interest in fraud prevention.[75] An earlier registration period, the court observed, would provide the State the time it said it needed to verify registrations, while eliminating additional days for EIP "does not withstand logical scrutiny."[76] And an appellate court rejected North Carolina's contention (and the district court's finding) that the elimination of same day registration (SDR) was necessary to promote electoral integrity and prevent fraud, finding "nothing in the district court's portrayal of the facts

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[72] Frank v. Walker, 17 F. Supp. 3d 837, 847–48, 850, 852 (E.D. Wis. 2014) (stating that "a person would have to be insane to commit voter-impersonation fraud" given the penalties that could result and the unclear benefits that could be achieved, and finding neither evidence nor plausible reason why the contested measure might block illegal voting by felons and noncitizens).

[73] Veasey v. Perry, No. 13-CV-00193, 2014 WL 5090258, at *53, *55 (S.D. Tex. Oct. 9, 2014) (noting that state legislature opted not to mitigate measure's effect on specific voters and racial minorities, despite ability to do so without hindering the measure's anti-fraud rationale, and that "[d]efendants did not provide evidence that the discriminatory features of SB 14 were necessary to accomplish any fraud-prevention effort" or that they led "to any increased voter confidence or voter turnout"); *see also* Veasey v. Perry, 135 S. Ct. 9, 11–12 (2014) (Ginsburg, J., dissenting) (finding that Texas "did not begin" to show that aspects of the measure that disproportionately burdened minority voters were "necessary to prevent fraud or increase public confidence in the electoral process").

[74] Ohio State Conference of NAACP v. Husted, 43 F. Supp. 3d 808, 844 (S.D. Ohio 2014).

[75] *See id.*

[76] *See id.* ("[T]he potential for fraud identified . . . exists whether voters are allowed to register and vote on the same day or not, and is best combatted by election officials following the law and applicable procedures and not counting absentee votes prior to the proper verification of registration.").

suggests that those are anything other than merely imaginable."[77] Invoking the district court's decision in *Frank v. Walker*,[78] the appellate court held that "states cannot burden the right to vote in order to address dangers that are remote and only 'theoretically imaginable.'"[79]

Lower courts have also disputed state claims that challenged electoral restrictions foster voter confidence and participation. In *Frank*, the district court cited survey data collected soon after *Crawford* that suggested that voter ID measures do not contribute to either voter confidence or voter participation.[80] Noting an absence of contrary evidence in Wisconsin, the court held that the State's voter ID measure "does not further the State's interest in promoting confidence in the electoral process" and might, in fact, "undermine the public's confidence in the electoral process" by keeping eligible voters from voting and thus making electoral results less reflective of the will of the people.[81]

The district court in *Veasey* likewise noted that "nothing in the evidence linked . . . SB 14 with voter confidence," and suggested the measure "would likely decrease voter confidence" by preventing "fully qualified, registered voters" from voting in person and either "relegat[ing them] to the less reliable mail-in ballot" or preventing them from voting entirely. The court held that the "state interest in running elections in a manner that instills confidence . . . is not served by the overly strict terms of SB 14."[82]

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[77] League of Women Voters of N.C. v. North Carolina, 769 F.3d 224, 246 (4th Cir. 2014).

[78] Frank v. Walker, 17 F. Supp. 3d 837, 843 (E.D. Wis. 2014).

[79] *League of Women Voters of N.C.*, 769 F.3d at 246 (quoting *Frank*, 17 F.Supp.3d at 850 (quoting Williams v. Rhodes, 393 U.S. 23, 33 (1968))).

[80] *See Frank*, 17 F. Supp. 3d. at 834; *see also* Stephen Ansolabehere & Nathaniel Persily, *Vote Fraud in the Eye of the Beholder: The Role of Public Opinion in the Challenge to Voter Identification Requirements*, 121 HARV. L. REV. 1737, 1760 (2008) ("This lack of empirical support leads us to conclude that, at least in the context of current American election practices and procedures, public perceptions do not provide a firm justification for voter identification laws.").

[81] *Frank*, 17 F. Supp. 3d. at 852.

[82] Veasey v. Perry, No. 13-CV-00193, 2014 WL 5090258, at *47 (S.D. Tex. Oct. 9, 2014); *see also* Veasey v. Perry, 135 S. Ct. 9, 12 (2014) (Ginsburg, J., dissenting) (stating that "[t]he greatest threat to public confidence in elections in this case is the prospect of enforcing a purposefully discriminatory law, one that likely imposes an unconstitutional poll tax and risks denying the right to vote to hundreds of thousands of eligible voters").

The appellate court in *Frank* nevertheless concluded that, under *Crawford*, the state interests in preventing voter fraud and fostering voter confidence sufficed to justify Wisconsin's voter ID measure. While "voter impersonation is rare if not nonexistent," Judge Easterbrook noted that the absence of fraud did not undermine the anti-fraud rationale in *Crawford*, and hence concluded it should not in other cases either.[83] The court, moreover, characterized the maintenance of voter confidence as a "legislative fact" that lower courts could not revisit after *Crawford*, notwithstanding either an absence of supporting evidence or the existence of empirical evidence to the contrary.[84]

Judge Posner disagreed.[85] He had previously observed that "voting fraud impairs the rights of legitimate voters,"[86] but by *Frank* was no longer convinced that it did. Judge Posner wrote that the absence of evidence showing in-person voting fraud to be a problem meant that the prevention of such fraud neither justified nor motivated the disputed measure.[87] He likewise noted evidence that voter ID does not promote voter confidence, adding that, even had polling data suggested otherwise, "it would imply a massive public misunderstanding, since requiring a photo ID in order to be permitted to vote appears to have no effect on election fraud."[88]

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[83] Frank v. Walker, 768 F.3d 744, 750 (7th Cir. 2014) (making this claim and adding that a photo ID requirement "deters fraud (so that a low frequency stays low)" and promotes other interests); *see also* Green Party of Tenn. v. Hargett, No. 2:13-cv-224 at 14 (E.D. Tenn. Feb. 20, 2014), *available at* http://www.scribd.com/doc/208815196/TN—Opinion-on-Voter-ID, *archived at* http://perma.cc/E5EU-8ZRH ("Plaintiff's allegations of Tennessee's lack of empirical evidence of in-person fraud or that requiring photo identification will reduce it are irrelevant.").

[84] *Frank*, 768 F.3d at 749–50 (arguing that better record-keeping, like voter confidence, were not issues open to reconsideration after Crawford—"in our hierarchical judicial system a district court cannot declare a statute unconstitutional just because he thinks (with or without the support of a political scientist) that the dissent was right and the majority wrong").

[85] *Frank*, 773 F.3d at 795, 784–85 (Posner, J., dissenting).

[86] Crawford v. Marion Cnty. Election Bd., 472 F.3d 949, 951–52 (7th Cir. 2007).

[87] *Frank*, 773 F.3d at 796 (Posner, J., dissenting) (suggesting that the quest for partisan advantage best explained the measure).

[88] *See id.* at 794–95 (noting that the Ansolabehere and Persily article showed that "perceptions of voter impersonation fraud are unrelated to the strictness of a state's voter ID law" and that therefore, "[i]f perceptions of the prevalence of voter-impersonation fraud are unaffected by the strictness of a state's photo ID laws, neither will confidence in the honesty of elections rise, for it would rise only if voters were persuaded that such laws reduce the incidence of such fraud").

Here, too, the Supreme Court's view is uncertain. Back in *Crawford*, the Justices found the State's interest in preventing voter fraud and fostering voter confidence sufficient to uphold a voter ID measure on its face in a case that presented no evidence of a fraud problem that demanded a solution or empirics to support the causal claim asserted between voter ID and voter confidence.[89] Still, Justice Stevens's plurality opinion found the record in the case wanting in numerous respects and new or additional evidence might illuminate not simply the burden plaintiffs alleged but the nature of state interests asserted. The denial of review in *Frank* leaves this question unresolved.[90]

What is clear is that the Court left standing an appellate opinion that upholds state interests with willful blindness to the evidence undermining these interests. That stance, and the support *Crawford* offers for it, contrasts with the approach taken in the marriage cases, in which proffered state interests largely collapsed under examination in most lower courts that reviewed the issue. These interests have collapsed, moreover, not simply as a derivative consequence of judicial findings that same-sex marriage bans burden the right to marry, but instead as standalone findings that themselves contributed to the analysis of the burden imposed. In other words, the absence of evidence supporting the state interests in the marriage cases illuminated not only the weakness of the state interests asserted, but also propelled more searching analysis of the burden imposed by the bans and the motivation behind them.

The voting plaintiffs have similarly prevailed when lower courts have been willing to probe the state interests asserted in defense of challenged electoral regulations and treat the absence of supporting evidence for them as probative. Judges who did so concluded that this lack of empirical support rendered the state interests themselves insubstantial, a finding that buttressed and propelled their conviction that the burden imposed was consequential and the motivation underlying the regulation suspect.

None of these voting decisions are presently in effect. Much like the distinction between complete bans and significant burdens on a fundamental right, empirical support (or the lack

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[89] Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 194–97 (2008).

[90] Frank v. Walker, No. 14-803, 2015 WL 131119, at *1 (U.S. Mar. 23, 2015).

thereof) is playing a different role in the voting disputes than it played in the marriage cases.

II. DEFERENCE AND DISCRIMINATORY INTENT

After *Windsor*, courts examined same-sex marriage bans with considerable rigor. They viewed the burden imposed to be significant, notwithstanding the availability of civil unions and domestic partnerships, and they have refused, in the main, to defer to state interests offered in defense of the bans, deeming either the absence of supporting evidence or the existence of contrary evidence fatal to the validity of the state interests invoked. By contrast, what appears to be the dominant approach in the voting cases accords far more deference to state action. Alleged burdens dissipate in light of either the prospect of participation or the availability of other, less desirable mechanisms to cast a ballot; state interests, meanwhile, withstand scrutiny in the absence of empirical grounding and even in the face of undermining evidence.

This variation in deference may stem from the belief that bans on same-sex marriage involved a more troublesome sort of discrimination.[91] Animus was widely seen to underlie same-sex marriage bans, while more calculated, instrumental goals are thought to propel the voting restrictions. Less deference may have been accorded in the marriage cases because animus-based discrimination is seen to be the more severe form of discrimination. This Part first describes and then challenges this claim.

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[91] Seven years ago, Judge Posner suggested that deferential review of voter ID was appropriate because the dispute was one in which "the right to vote is on both sides of the ledger." Crawford v. Marion Cnty. Election Bd., 472 F.3d 949, 952 (7th Cir. 2007) (2008) (stating that "voting fraud impairs the rights of legitimate voters to vote by diluting their votes"). That idea was always controversial, and by *Frank*, Judge Posner was no longer convinced by it. *See Frank*, 773 F.3d at 792, 796 (Posner, J., dissenting) (disputing notion that voter ID measures advance voting rights). The ledger image fails to explain the lesser deference accorded in the marriage cases, given that fundamental rights are as readily apparent on "both sides of the ledger" in those cases as they ever were in the voting arena. *See supra* note 67 and accompanying text (discussing state claim that same-sex marriage bans are necessary to protect the integrity of traditional marriage).

A. Gradations of Discriminatory Intent

The marriage plaintiffs could have displaced same-sex marriage bans without presenting any evidence that the state officials involved acted with discriminatory intent; similarly, the voting plaintiffs could prevail without establishing discriminatory intent.[92] In both contexts, however, the plaintiffs have pressed the claim that discriminatory intent propelled the regulations they challenge. As discussed below, various marriage decisions that reached the issue explicitly found animus, while the sole voting decision that found discriminatory intent did not.

In the marriage cases, courts addressing the issue of discriminatory intent repeatedly found that same-sex marriage bans were motivated by animus.[93] These decisions noted, *inter alia*, that "this law is motivated by animus;"[94] that it has no purpose "other than to effect pure animus;"[95] that these laws "single out" same-sex couples for disfavored treatment;[96] that "disparagement of . . . sexual orientation" is "implicit in the denial of marriage rights to same-sex couples,"[97] and that withholding the term "marriage" had "no justification other than bigotry."[98] The "clear primary purpose and practical effect of the marriage bans . . . [is] to disparage and demean the dignity of same-sex couples in the eyes of the State and the wider community."[99]

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[92] Proof of such intent is not an essential element of the VRA Section 2 injury, see 42 U.S.C. § 1973 (proscribing conduct that "results" in a denial or abridgment of the right to vote); Thornburg v. Gingles, 478 U.S. 30, 35 (1986), nor is it necessary to establish a Fourteenth Amendment injury grounded either in the deprivation of a fundamental right, see, e.g., Burdick v. Takushi, 504 U.S. 428, 434 (1992); Loving v. Virginia, 388 U.S. 1, 12 (1967), or an irrational state action. See e.g., Kitchen v. Herbert, 961 F. Supp. 2d 1181, 1207, 1215 (D. Utah 2013) (finding marriage law invalid under rational basis review).

[93] *But see* Bishop v. Smith, 760 F.3d 1070, 1104 (10th Cir. 2014) (Holmes, J., concurring) (citing "considerations [that] cut strongly against a finding of animus"); DeBoer v. Snyder, 973 F. Supp. 2d 757, 773 (E.D. Mich. 2014) (declining to ascribe animus as the motivation of the "the approximately 2.7 million voters who approved the measure").

[94] Baskin v. Bogan, 12 F. Supp. 3d 1144, 1163 (S.D. Ind. 2014).

[95] De Leon v. Perry, 975 F. Supp. 2d 632, 646, 662–63 (W.D. Tex. 2014).

[96] *See, e.g.*, *Baskin*, 12 F. Supp. 3d at 1163; Campaign for S. Equal. v. Bryant, 2014 WL 6680570, at *34 (S.D. Miss. Nov. 25 2015).

[97] *See, e.g.*, Baskin v. Bogan, 766 F.3d 648, 658 (7th Cir. 2014).

[98] *See id.* at 670.

[99] *See* Obergefell v. Wymyslo, 962 F. Supp. 2d 968, 995 (S.D. Ohio 2013); *see also*

Compare this narrative to the account of state action in the sole voting dispute to produce a finding of intentional race discrimination. In *Veasey*,[100] Judge Nelva Gonzales Ramos found that Texas's voter ID provision, while facially neutral as to race, disproportionately burdened African-American and Hispanic voters and that this racially disparate impact was the "but-for" reason the State adopted the measure.[101] Applying the *Village of Arlington Heights v. Metropolitan Housing Development Corporation*[102] framework for determining whether discriminatory intent is a motivating factor for a facially neutral law,[103] Judge Ramos noted the irregular process by which the State adopted the measure; the legislature's awareness of SB-14's racially disparate impact; and, most critically, the legislature's decision to reject amendments that would have mitigated that impact without hindering advancement of the fraud prevention goals SB-14 purported to promote.[104] Judge Ramos concluded that the evidence "demonstrates that proponents of SB 14 within the 82nd Texas Legislature were motivated, at the very least in part, *because of* and not merely *in spite* of the voter ID law's detrimental effects on the African–American and Hispanic electorate."[105]

Latta v. Otter, 771 F.3d 456, 476 (9th Cir. 2014) ("The official message of support . . . in favor of opposite-sex marriage . . . necessarily serves to convey a message of disfavor towards same-sex couples and their families."); Bostic v. Rainey, 970 F. Supp. 2d 456, 481 (E.D. Va. 2014) (finding basis to suspect prejudice and finding that "moral condemnation" of homosexuality "continues to manifest in Virginia in state-sanctioned activities"); Henry v. Himes, 14 F. Supp. 3d 1036, 1044–45 (S.D. Ohio 2014); Latta v. Otter, 19 F. Supp. 3d 1054, 1080 (D. Idaho 2014) (finding that "moral disapproval of homosexuality was an underlying, animating factor" for same-sex marriage ban).

Some judges and commentators have argued that it is unnecessary and even "unwise" to resolve allegations of discriminatory intent in the marriage cases, given the speed at which views on same-sex marriage have evolved, the damage caused by accusations of bigotry, and the difficulties that inhere in assessing voter intent. *See, e.g.*, Bishop v. Smith, 760 F.3d 1070, 1096–97 (10th Cir. 2014) (Holmes, J., concurring); Wolf v. Walker, 986 F. Supp. 2d 982, 1009 (W.D. Wis. 2014); Geiger v. Kitzhaber, 994 F. Supp. 2d 1128, 1140–41, 1146–47 (D. Or. 2014); Kitchen v. Herbert, 755 F.3d 1193, 1236 (10th Cir. 2014) (Kelly, J., concurring in part and dissenting in part); *see also* Brief of Amici Curiae Steven G. Calabresi, Daniel O. Conkle, Michael J. Perry, & Brett G. Scharffs In Support of Certiorari and Opposing a Ruling Based on Voters' Motivations at 5–6, 11, Herbert v. Kitchen, 134 S. Ct. 893 (2014) (No.14-124).

[100] *Veasey v. Perry*, No. 13-CV-00193, 2014 WO 5090258 (S.D. Tex. Oct. 9, 2014).

[101] *Id.* at *48, *56, *58.

[102] *See* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977).

[103] *See id.* at 265; *see also* Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979).

[104] *Veasey*, 71 F. Supp. 3d, at 699-703.

[105] *Id.* at *703; *see also* Veasey v. Perry, 135 S. Ct. 9, 11–12 (2014) (Ginsburg, J., dissenting) (Texas "did not begin to demonstrate that the Bill's discriminatory features

Judge Ramos went on to explain why the Texas Legislature designed its voter ID measure to burden African-American and Latino voters. The opinion states that lawmakers recognized that "Republicans in Texas . . . facing a declining voter base . . . [could] gain partisan advantage by suppressing the overwhelmingly Democratic votes of African-Americans and Latinos."[106] Judge Ramos accordingly credited evidence that documented "intentional discrimination against minorities to achieve a partisan political advantage."[107]

Notice that this finding of intentional racial discrimination never mentions "animus" or "bigotry." One can debate whether those terms might appropriately be used to describe official conduct that seeks to burden a racially-defined group because of its partisan affiliation.[108] But Judge Ramos decidedly avoided that characterization. (Judge Posner also avoided these terms, when, in *Frank*, he offered a similar explanation for the proliferation of measures like voter ID.)[109] For Judge Ramos, the

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were necessary" and that "[o]n this plain evidence, the District Court concluded that the Bill would not have been enacted absent its racially disparate effects").

[106] *Veasey*, 71 F. Supp. 3d, at 700.

[107] *Id.* at 658.

[108] There is also debate among some commentators as to whether partisan-infused electoral restrictions should be categorized to involve racial discrimination at all. *See, e.g.*, Samuel Issacharoff, *Ballot Bedlam*, 64 DUKE L.J. 1363, 1394 (2015) (suggesting that "the category of race increasingly fails to capture the primary motivation for what has become a battlefield in partisan wars"). These commentators urge what my colleague Sam Bagenstos describes to be a "universalist" approach to voting rights, *see* Samuel R. Bagenstos, *Universalism and Civil Rights (with Notes on Voting Rights After Shelby)*, 123 YALE L.J. 2838 (2014), namely, one that focuses on the ways a disputed regulation may burden the right to vote rather than on the group or groups who are burdened by it. The idea is that voting claims grounded in universal terms are more likely to succeed, better promote core values, and thus serve more voters more effectively than more conventional civil rights terms. *See, e.g.*, Samuel Issacharoff, *Beyond the Discrimination Model on Voting*, 127 HARV. L. REV. 95, 121–23 (2013); Richard H. Pildes, *Room for Debate: We Need a Broader Approach*, N.Y. TIMES (Feb. 24, 2013), *available at* http://www.nytimes.com/roomfordebate/2013/02/24/is-the-voting-rights-act-still-needed/we-need-a-broader-approach, *archived at* http://perma.cc/JU5W-JFEU; Richard L. Hasen, *Race or Party?: How Courts Should Think About Republican Efforts to Make it Harder to Vote in North Carolina and Elsewhere*, 127 HARV. L. REV. 58, 58 n.2 (2014); *see also* Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. REV. 689, 701 (2006). Shaped by both strategic and normative considerations, the universalist's position does not—on my reading at least—insist that courts err when, as Judge Ramos did, they find racial discrimination under the *Arlington Heights* framework.

[109] Frank v. Walker, 773 F.3d 783, 791 (7th Cir. 2014) (Posner, J., dissenting). (observing that "a number of conservative states try to make it difficult for people who are outside the mainstream, whether because of poverty or race or problems with the English language, or who are unlikely to have a driver's license or feel comfortable

state action at issue stemmed from intentional racial discrimination, regardless of whether animus in the form of ill-will toward African-American and Latino voters propelled the legislature to enact the voter ID measure that it did. In her view, a plan to burden a racial group for partisan gain sufficed.

This account of state action differs from what was the prevailing narrative in the marriage cases that addressed intent. Both identify state action crafted to burden members of a defined group,[110] and both categorize such action as intentionally discriminatory, but offer distinct reasons for why the state actors imposed the burdens at issue. Where Judge Ramos identified intentionally discriminatory conduct calculated to advance partisan goals, the marriage decisions identified similar conduct motivated by animus and crafted to express that animus.

B. Circumscribing Discrimination

The line separating animus-based discrimination from the more calculated, instrumental discrimination Judge Ramos identified should be a distinction without a difference. Both types of intent capture state action crafted to impose significant and selective burdens on specific minority groups. Both operate inexorably as sources of long-term structural harm. Both are recent, but far from novel, manifestations of a long tradition of intentionally discriminatory state action motivated by animus, by partisan or otherwise strategic goals, and often by both.[111] Gauging the relative damage caused by one or the other is a fraught, ahistorical and unproductive endeavor from which legal consequences ought not to follow.

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dealing with officialdom, to vote . . . because if they do vote they are likely to vote for Democratic candidates").

[110] Both accordingly differ from the longstanding, now discredited category of "benign" discrimination intended to benefit group members. *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995), City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989); United Jewish Organizations of Williamsburgh, Inc. v. Carey, 430 U.S. 144, 175 (1977) (Brennan, J., concurring in part).

[111] J. MORGAN KOUSSER, THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTIONS AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH, 238–65 (1st ed. 1974); *see also* Cary Franklin, *Discriminatory Animus, in A Nation of Widening Opportunities: The Civil Rights Act at 50* (forthcoming Michigan Univ. Press); Issacharoff, *supra* note 107, at 1394 ("Black voting rights were antithetical to the status quo based on Jim Crow, but for more than one reason.").

And yet, the sense that animus-based discrimination is more damaging than more calculated discrimination may best explain why courts were more inclined to side with the marriage plaintiffs than they have been with the voting plaintiffs. When animus is suspected or explicitly found, as it was in the marriage cases, courts do not defer to state action even on issues unrelated to intent. Challenged regulations were seen to burden a fundamental right and state interests offered in support were deemed inadequate. More mixed results follow when animus is not understood to underlie the challenged state conduct. Deference to state action becomes more likely, the burdens challenged regulations impose tend to be minimized, and the state interests offered validated.

This privileging of animus-based discrimination over other types of intentional discrimination may help explain why Judge Ramos' ruling—the sole finding to date of racially discriminatory intent in the post-*Shelby County* voting litigation—was quickly rendered inoperative by the Fifth Circuit and the Supreme Court.[112] Judicial willingness to allow implementation of a state law adjudicated to be the product of intentional racial discrimination was met with some surprise;[113] and yet, a good deal of intentionally discriminatory conduct had been allowed to proceed without remedy in recent years.[114]

Shelby County itself captures this stance and the accompanying judgment that not all conduct falling within the category of discriminatory intent is equally culpable. That decision left a key provision of the VRA inoperative, based, in part, on the finding that the discrimination documented in the 2006 congressional record reauthorizing it was not as severe as the discrimination that first led Congress to enact the VRA.[115]

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[112] *See* Veasey v. Perry, 135 S. Ct. 9 (2014); Veasey v. Perry, 769 F.3d 890, 895 (5th Cir. 2014).

[113] *See, e.g.*, Richard L. Hasen, *Dawn Patrol*, SLATE (Oct. 19. 2014), *available at* http://www.slate.com/articles/news_and_politics/jurisprudence/2014/10/ginsburg_s_dissent_in_texas_voter_id_law_supreme_court_order.html?wpsrc=sh_all_dt_tw_top, *archived at* http://perma.cc/JXJ3-Q29Y ("It appears to be unprecedented to let a law that was deemed racially discriminatory go into effect simply to avoid the risk of voter confusion and election administration inefficiency.").

[114] *See* Ellen D. Katz, *Justice Ginsburg's Umbrella, in A Nation of Widening Opportunities: The Civil Rights Act at 50* (forthcoming Michigan Univ. Press).

[115] Shelby County v. Holder, 133 S. Ct. 2612, 2629 (2013) (noting the record evidence did not "show[] anything approaching the 'pervasive,' 'flagrant,' 'widespread,' and 'rampant' discrimination that faced Congress in 1965, and that clearly distinguished the

Chief Justice Roberts's majority opinion, however did not dispute Justice Ginsburg's observation, made in dissent, that the record documented persistent and prevalent unconstitutional discrimination.[116] By immobilizing the statutory regime in the face of that recognized discrimination, *Shelby County* endorsed a distinction between overt discrimination of the extreme Jim Crow variety and the less brazen defiance of constitutional norms we see today.

The voting and marriage cases decided after *Windsor* and *Shelby County* and before *Obergefell* suggest a similar distinction between types of intentional discrimination. By applying more rigorous review to state action when animus is suspected or identified, these decisions isolated animus-based discrimination for distinct condemnation and intimated that the more calculated discrimination of the sort Judge Ramos identified might not be cause for concern.

As such, the decisions threaten a deeply consequential narrowing of actionable discrimination. The animus-based discrimination identified in the marriage cases between *Windsor* and *Obergefell* is increasingly scarce in arenas in which civil rights protections have been accorded for longer periods. Indeed, it is far from happenstance that same-sex marriage bans were analogized to the Jim Crow-era anti-miscegenation laws ultimately struck down in *Loving v. Virginia*.[117] The fight for marriage equality was said to resemble the early civil rights struggle against racial discrimination,[118] and the understanding

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covered jurisdictions from the rest of the Nation at that time").

[116] *See id.* at 2639–43, 2646–47 (Ginsburg, J., dissenting).

[117] *See, e.g.*, Baskin v. Bogan, 766 F.3d 648, 670 (7th Cir. 2014); Kitchen v. Herbert, 961 F. Supp. 2d. 1181, 1215 (D. Utah 2013) (finding State's arguments supporting same-sex marriage ban to be "almost identical" to those made by Virginia in 1966 to defend interracial marriage ban and finding them "as unpersuasive as the Supreme Court found them fifty years ago"); Wolf v. Walker, 986 F. Supp. 2d 982, 1027–28 (W.D. Wis. 2014) (rejecting as inadequate the prospect that voters might repeal same-sex marriage, noting that same prospect existed with regard to anti-miscegenation laws, and concluding that "a district court may not abstain from deciding a case because of a possibility that the issues raised in the case could be resolved in some other way at some other time").

[118] *See* Steven G. Calabresi, *Gay Marriage and the Fourteenth Amendment*, Northwestern Public Law Research Paper No. 14-51 (2013), at 16, *available at* http://ssrn.com/abstract=2509443, *archived at* http://perma.cc/C25M-GE52 (observing that "[s]tate laws that ban same sex marriage formally discriminate on the basis of sex in the same way that State laws that banned inter-racial marriage discriminated on the basis of race"); *see also* Campbell Robertson & Shaila Dewan, *In Defiance on Gay Marriage, Alabama Sets Itself Far Apart*, N.Y. TIMES (Feb. 9, 2015), *available at* http://www.nytimes.com/2015/02/11/us/in-defiance-alabama-sets-itself-far-apart.html,

of same-sex marriage bans as explicit, animus-based discrimination comports with that view.

But animus of the Jim Crow sort captures only a portion of the conduct long understood to fall within the category of intentional discrimination.[119] The suggestion that animus might define the category in its entirety is a new idea that caricatures historical practice and ignores the nature of the discriminatory practices that gave rise to modern civil rights laws in the first instance. In practice, it portends repudiation of the *Arlington Heights* framework by relegating actionable discrimination to what is regarded in the main as deviant behavior and immunizing the types of structural inequality that make calculated discrimination of the sort Judge Ramos identified attractive to state actors.

III. DEFERENCE AND DIGNITY

The sense that animus-based discrimination is distinctly culpable fuels the view that the marriage and voting cases are categorically different. In so doing, it obscures a central characteristic these cases may share. Bans on same-sex marriage are now widely seen to have inflicted a dignitary harm on same-sex couples. The voting restrictions challenged in the post-*Shelby County* litigation might be similarly understood, but that idea has yet to find application or even expression in the voting disputes.

The idea of dignity pervaded arguments for same-sex marriage. The marriage plaintiffs made clear they sought not only the tangible benefits of marriage but "equal dignity for their marital aspirations."[120] *Windsor* observed that marriage

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archived at http://perma.cc/9GJ6-BFEV (linking state Chief Justice's resistance to federal court order on same-sex marriage to George Wallace's infamous stand in the schoolhouse door opposing integration).

[119] *See also* Franklin, *supra* note 111 (criticizing use of Title VII "as a mechanism for policing outliers" and seeking "to engage in a new conversation—or really, reinvigorate an older conversation—about what constitutes discrimination under the law").

[120] Kitchen v. Herbert, 755 F.3d 1193, 1199, 1207–08 (10th Cir. 2014); *see also* Bostic v. Schaefer, 760 F.3d 352, 368 (4th Cir. 2014) (noting plaintiffs' claim that "the 'inability to marry or have their relationship recognized . . . with the dignity and respect accorded to married opposite-sex couples has caused them significant hardship'"); Bishop v. Smith, 760 F.3d 1070, 1074–75 (10th Cir. 2014) (plaintiffs "feel . . . that marriage conveys a 'level of commitment or respect' that is not otherwise available . . . [and] that their inability to marry under Oklahoma law is 'demeaning' and 'signals to others that they should not respect our relationship.'"); DeBoer v. Snyder, 772 F.3d 388, 417 (6th Cir. 2014) ("While these cases present a denial of access to many benefits, what is '[o]f

confers "a dignity and status of immense import,"[121] and lower courts after *Windsor* repeatedly identified same-sex marriage bans to inflict dignitary harm on same-sex couples.[122] They, for instance, found that same-sex marriage bans "disparage[d] and demean[ed] the dignity of same-sex couples in the eyes of the State and the wider community;"[123] they denied the children of same-sex couples "the recognition essential to . . . dignity" and thereby prevented "those children from being recognized as members of a family by their peers;"[124] they denied from same-sex couples "respectability," labeled their families "as second-class;" and "materially harm[ed] and demean[ed] same-sex couples and their children."[125] The bans "humiliate[ed]"[126] and prevented same-sex couples "from participating fully in our society."[127] These injuries stemmed not from the denial of the tangible benefits marriage provides (and that a civil union or domestic partnership regime might offer) and arose instead because same-sex marriage bans denied same-sex couples the right "to publicly solemnize"[128] their relationship in the way opposite-sex couples were allowed to.[129]

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greater importance' to the claimants, as they see it, 'is the loss of . . . dignity and respect' occasioned by these laws"); Tanco v. Haslam, 7 F. Supp. 3d 759, 766 (M.D. Tenn. Mar. 14, 2014) ("[T]he plaintiffs aver as follows: . . . 'that our family must suffer the indignity, stress, and stigma of not knowing whether or when our marriage will be recognized.'").

[121] United States v. Windsor, 133 S. Ct. 2675, 2692 (2013).

[122] *See, e.g.*, Baskin v. Bogan, 766 F.3d 648, 658 (7th Cir. 2014) (providing equal access to marriage will "demonstrate[e] that homosexual married couples are in essential respects, notably in the care of their adopted children, like other married couples"); Kitchen v. Herbert, 755 F.3d 1193, 1214 (10th Cir. 2014) ("[S]urely a great deal of the dignity of same-sex relationships inheres in the loving bonds between those who seek to marry and the personal autonomy of making such choices."); Henry v. Himes, 14 F. Supp. 3d 1036, 1060 (S.D. Ohio 2014) (stating that ban on same-sex marriage deprives "these families of . . [the] dignity that come with recognition of their marriages"); Obergefell v. Wymyslo, 962 F. Supp. 2d 968, 981–82 (S.D. Ohio 2013) (noting "the harm Plaintiffs suffer when they lose . . . the immensely important dignity, status, recognition, and protection of lawful marriage"); cf. DeBoer v. Snyder, 772 F.3d 388, 417 (6th Cir. 2014) (stating that "any loss of dignity and respect on this issue . . . came from the neighborhoods and communities in which gay and lesbian couples live, and in which it is worth trying to correct the problem in the first instance").

[123] *Obergefell*, 962 F. Supp. 2d at 995.

[124] *Kitchen*, 755 F.3d at 1215.

[125] *Baskin*, 766 F.3d at 658; Latta v. Otter, 771 F.3d 456, 472–73 (9th Cir. 2014); Campaign for S. Equal. v. Bryant, No. 3:14-CV-818-CWR-LRA, 2014 WL 6680570, at *2 (S.D. Miss. Nov. 25, 2014).

[126] Bostic v. Rainey, 970 F. Supp. 2d 456, 478 (E.D. Va. 2014).

[127] Bostic v. Schaefer, 760 F.3d 352, 384 (4th Cir. 2014).

[128] DeBoer v. Snyder, 772 F.3d 388, 407–08 (6th Cir. 2014).

[129] *See, e.g.*, *Schaefer*, 760 F.3d at 377 ("[T]he choices that individuals make in the

An analogous injury might be seen to follow from many of the electoral restrictions challenged post-*Shelby County*. For instance, voters lacking compliant ID under various state ID measures need to "scrounge up a birth certificate,"[130] make repeated trips to varied municipal and state offices, take time off from work, secure transportation, and pay consequential fees.[131] Some of these voters may ultimately succeed in casting a ballot, but, to do so, they must first successfully perform a number of burdensome tasks that voters who already possess compliant ID for other purposes need not undertake, much less accomplish. As Judge Ann Claire Williams stated in dissent in *Frank v. Walker*, "the right to vote . . . is not just held by those who have cars and so already have driver's licenses and by those who travel and so already have passports."[132] Put differently, ID requirements do not simply make voting significantly more onerous for voters lacking qualifying ID, but they make it arduous in ways voters who already possess requisite ID for other purposes do not experience.[133]

It is in this sense that the injury that results from voter ID laws resembles the dignity-based harm that same-sex marriage bans are now understood to inflict. The analogy is far from perfect, but it is sufficient to isolate an unexamined aspect of the injury many of the post-*Shelby County* voting regulations cause. Much like same-sex couples who were denied the ability to

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context of same-sex relationships enjoy the same constitutional protection as the choices accompanying opposite-sex relationships."); Kitchen v. Herbert, 755 F.3d 1193, 1229–30 (10th Cir. 2014) (noting "same sex [couples] are entitled to exercise the same fundamental right as is recognized for persons who wish to marry a person of the opposite sex"); *Campaign for S. Equal.*, 2014 WL 6680570, at *14 (Banning same-sex marriage "serves to undermine the dignity of gay and lesbian citizens by suggesting that they are unworthy of sharing rights fundamental to every free person."); Wolf v. Walker, 986 F. Supp. 2d 982, 988 (W.D. Wis. June 13, 2014) (Invalidating same sex marriage ban "merely affirm[s] that [same-sex] couples have rights to liberty and equality under the Constitution, just as heterosexual couples do."); Bostic v. Rainey, 970 F. Supp. 2d 456, 478 (E.D. Va. 2014) ("Plaintiffs honor, and yearn for, the sacred values and dignity that other individuals celebrate when they enter into marital vows in Virginia, and they ask to no longer be deprived of the opportunity to share these fundamental rights."); De Leon v. Perry, 975 F. Supp. 2d 632, 659 (W.D. Tex. 2014) ("By denying Plaintiffs Holmes and Phariss the fundamental right to marry, Texas denies their relationship the same status and dignity afforded to citizens who are permitted to marry.").

[130] *See* Frank v. Walker, 769 F.3d 494, 498 (7th Cir. 2014) (Williams, J., dissenting); Frank v. Walker, 773 F.3d 783, 796 (7th Cir. 2014) (Posner, J., dissenting).

[131] *See, e.g.*, Veasey v. Perry, No. 13-CV-00193, 2014 WL 5090258, at *21, *48 (S.D. Tex. Oct. 9, 2014).

[132] *See Frank*, 769 F.3d at 498 (Williams, J., dissenting).

[133] *See, e.g.*, Veasey v. Perry, 135 S. Ct. 9, 12 (2014) (Ginsburg, J., dissenting).

solemnize their relationship as opposite-sex couples do and the public recognition that comes from doing so,[134] voters lacking compliant ID are denied both the ability to "vote without hindrance"[135] as other voters are allowed to do and the public recognition that comes from the exercise of citizenship that voting in this manner represents.

In both contexts, the resulting dignitary injury is premised on the idea that dignity emerges from performative acts and the recognition and respect law accords to them.[136] It is, thus, not happenstance that the marriage plaintiffs tended to be in long-term, committed relationships, often raising children and participating in various civic-minded projects. Nor is it an accident that they challenged state laws that denied them the public recognition marriage provides and that is accorded to opposite-sex couples whether or not those couples presented themselves as the plaintiffs do.[137] Similarly, the voting plaintiffs are typically registered voters who have voted in numerous past elections and who now confront new voter ID requirements (or other measures) that transformed the act of participation into an ordeal. Whether or not these voters ultimately succeed in casting a ballot, they challenge electoral restrictions that impede their participation and compromise the recognition that comes from being able to cast a ballot unhindered as other voters can do.[138]

This dignitary harm, accordingly, is grounded more in equality than in liberty.[139] In both the marriage and voting

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[134] *See, e.g.*, Kitchen v. Herbert, 755 F.3d 1193, 1215 (10th Cir. 2014); Bostic v. Schaefer, 760 F.3d 352, 384 (4th Cir. 2014); Obergefell v. Wymyslo, 962 F. Supp. 2d 968, 995 (S.D. Ohio 2013).

[135] City of Mobile v. Bolden, 446 U.S. 55, 64 (1980).

[136] *See* JEREMY WALDRON, DIGNITY, RANK & RIGHTS 22 (2015); Katherine Franke, *Dignifying Rights: A Comment on Jeremy Waldron's Dignity, Rights and Responsibilities*, 43 ARIZ. ST. L.J. 1177, 1178 (2011).

[137] *See* Franke, *supra* note 136, at 1197 (describing and evaluating how proponents of marriage equality have "mounted a ritualized performance of responsibilized citizenship . . . that [h]aving become recognizable as respectable, the court could recognize them as dignified, rights-bearing subjects and equal in rank to other (heterosexual) legal citizens").

[138] *See* WALDRON, *supra* note 136, at 36 (observing that "although it is shared with millions of others the vote is not a little thing. It too can be understood in a more momentous way, as the entitlement of each person, as part of his or her dignity to an (equal) peer of the realm, to be consulted in public affairs").

[139] *Cf.* Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 749 (2011) (describing "liberty-based" and "equality-based" dignity claims).

disputes, dignitary harm results from a selective denial of access to an institution on the same terms that others are granted.[140] The injury derives from and builds upon the longstanding recognition that a "deprivation of personal dignity . . . surely accompanies denials of equal access to public establishments."[141]

Without doubt, recognition of a dignitary interest in the voting disputes presents difficulties not present in the marriage cases. As Justice Scalia recognized in *Crawford*, electoral rules necessarily "affect[] different voters differently,"[142] and elections could hardly be run if every differential impact gave rise to a cognizable dignitary harm, much less constitutional injury. Put differently, the prospect that electoral restrictions might inflict dignitary harms does not tell us which restrictions might do so and which do not.

Developing a framework for such an inquiry lies beyond the scope of this Article,[143] but some preliminary principles might nevertheless be distilled. For instance, some electoral regulations will not implicate dignity interests at all, either because the burdens they impose are *de minimus*, or because the issues they regulate do not themselves touch on dignitary concerns.[144] Other regulations might implicate dignitary interests but advance goals that warrant their implementation despite the injuries they cause. Context is critical such that the same rule might implicate dignity concerns in one jurisdiction but not another. The failure, for instance, to provide early voting

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[140] As such, the interest differs from the dignitary harm some suggest follows from facial race-based classifications. *See, e.g.*, Rice v. Cayetano, 528 U.S. 495, 499, 517 (2000) (observing that "it demeans the dignity and worth of a person to be judged by ancestry instead of by his own merit"); Parents Involved in Community Schools v. Seattle School Dist. No. 1, 551 U.S. 701 (2007) (Kennedy, J., concurring) (observing that state mandated racial labels are inconsistent with the dignity of individuals in our society); *see also* BERNARD WILLIAMS, PROBLEMS OF THE SELF 230-49 (1976).

[141] *See* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 250 (1964). For recent disputes on public access and religious freedom, *see, e.g.*, Daniel Roberts, *Walmart CEO to Arkansas Governor: Veto 'Religious Freedom' Legislation*, FORTUNE, Mar. 31, 2015, *available at* http://fortune.com/2015/03/31/walmart-ceo-asks-arkansas-governor-to-veto-religion-legislation/, *archived at* http://perma.cc/P4GZ-9SJV; Walmart Newsroom, *Our Statement on Arkansas #HB1228*, TWITTER, (Mar. 31, 2015, 5:26 PM), https://twitter.com/WalmartNewsroom/status/583032659787448320, *archived at* https://perma.cc/WT6B-GUL2.

[142] *See* Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 205 (2008) (Scalia, J., concurring).

[143] *See* Ellen D. Katz, *Bringing Dignity (Back) to Voting* (draft, on file with author).

[144] *See, e.g.*, Burdick v. Takushi, 504 U.S. 428 (1992) (upholding state ban on write-in candidates).

does not facially raise a concern grounded in dignity, and yet the withdrawal of that option on terms that eliminate what was a vibrant form of participation for distinct communities of voters plausibly implicates a dignity interest.[145] So too, an ID rejected because the voter "recently grew a beard" might be dismissed, as Justice Stevens once suggested, as a minor inconvenience "arising from life's vagaries,"[146] but such rejection also might inflict serious damage of a dignitary sort, for instance, to a transitioning transgender voter.[147]

Context also helps illuminate the ways in which inequality is manifest in the electoral arena, such that a rule's facial neutrality should not obscure the dignitary harm it might inflict.[148] Voter ID measures highlight this point but are just one example. Long wait times to vote in some precincts but not others raise concerns grounded in dignity, particularly when basic services are denied along the way. [149]

As has been widely observed, dignity is a particularly malleable concept,[150] such that "very different outcomes are

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[145] *See* Ohio State Conference of NAACP v. Husted, 768 F.3d 524, 558–59 (6th Cir. 2014) (noting plaintiffs' evidence "that the eliminated EIP voting times are those that African Americans disproportionately use, and that racial inequalities in socioeconomic status and other factors make it much more difficult for African Americans to vote at the remaining times or through the other methods now available under the status quo *as compared to other groups*.") (emphasis in original); *cf.* Richard L. Hasen, *The 2012 Voting Wars, Judicial Backstops, and the Resurrection of Bush v. Gore*, 81 GEO. WASH. L. REV. 1865, 1879–80 (2013) ("While the cutback of voting on the last weekend would be sure to inconvenience some voters and to put a kink in get-out-the-vote strategies, the move did not appear to be disenfranchising.").

[146] *See Crawford*, 553 U.S. at 198 (plurality opinion).

[147] *See, e.g.*, Veasey v. Perry, No. 13-CV-00193, 2014 WL 5090258, at *33 (S.D. Tex. Oct. 9, 2014) ("Mr. Ozias, who is in the process of changing his name, is registered to vote as Stephanie Lynn Dees. Mr. Ozias fears he will be turned away from the polls because, in his words, 'I don't really match my photograph and you always get people who just don't like transgender people . . .'").

[148] McConnell v. Fed. Election Comm'n, 540 U.S. 93, 249 (2003) (Scalia, J., dissenting) (observing, in another context, that, "as everyone knows, this is an area in which evenhandedness is not fairness").

[149] *See* Nicole Flatow, *New Rule Prohibits Voters in Miami-Dade County from Using the Restroom, No Matter How Long the Line*, THINKPROGESS (Apr. 10, 2014) *available at* http://thinkprogress.org/justice/2014/04/10/3425252/new-rule-prohibits-voters-in-miami-dade-county-from-using-the-restroom-no-matter-how-long-the-line/, *archived at* http://perma.cc/JDY5-YQTC.

[150] *See generally* Leslie Meltzer Henry, *The Jurisprudence of Dignity*, 160 U. PA. L. REV. 169, 174–75, 177 (2011) (observing that "a single concept of dignity with fixed boundaries does not exist" while offering a typology to organize the ways in which the Supreme Court invokes dignity).

derived" from its application.[151] The prominence of dignity in the debate over marriage equality nevertheless invites consideration of how dignity might find expression in connection with the right to vote, and a more detailed exploration of the shape that dignitary interest might take.[152]

CONCLUSION

The structural similarities between the voting and marriage cases that followed *Windsor* and *Shelby County* provide a lens through which to understand why their trajectories diverged. These similarities show courts giving greater deference to state action in the voting cases than in the marriage cases, despite evidence of intentional discrimination in both. The decisions accordingly suggest that courts see gradations within the category of intent-based discrimination and view some types of intent to be more problematic than others. Indeed, findings of animus in the marriage cases may have made the voting claims look weaker than they might have presented independently. While influence of this sort tends to be more atmospheric than direct and, accordingly, its very existence is necessarily speculative, the marriage cases isolated a type of intentional discrimination that may encourage, or perhaps even prompt, some to dismiss the type of discrimination identified in *Veasey v. Perry*.[153]

One can imagine the marriage cases influencing the voting cases in a very different way. Their rejection of civil unions and domestic partnerships as substitutes for marriage was premised on the idea that same-sex couples should have the same right to marriage and the dignity it accords as opposite-sex couples enjoy.[154] That insight has application in the voting context, where new electoral restrictions deny some voters, invariably the poor and racial minorities, the ability to vote in circumstances that others enjoy as a matter of course. These

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[151] *See generally* Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 EUR. J. INT'L L. 655, 698 (2008).

[152] *See* Katz, *supra* note 143.

[153] *See* Veasey v. Perry, 769 F.3d 890 (5th Cir. 2014).

[154] *See, e.g.*, Kitchen v. Herbert, 755 F.3d 1193, 1229–30 (10th Cir. 2014) ("[T]hose who wish to marry a person of the same sex are entitled to exercise the same fundamental right as is recognized for persons who wish to marry a person of the opposite sex.").

voters are arguably denied the dignity that follows from having that opportunity. To date, however, dignitary interests have played no consequential role in the voting disputes and remain unlikely to gain traction so long as they remain obscured by the belief that animus captures the category of intentional discrimination in its entirety.